No. 06-737

IN THE

Supreme Court of the United States

The Estate of LESLIE HARRISON CLEM, JR., Deceased, by and through Administrator, LESLIE CLEM, SR., *et al.*,

Petitioners,

v.

WESTERN HERITAGE INSURANCE COMPANY, a foreign insurer,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATED QUESTIONS PRESENTED

1. Where a liability insurance policy excluded coverage for injuries sustained by any person while participating in an event, exhibition, or show, did the policy provide coverage when a parade participant fell off a parade float and sustained fatal injuries?

   The district court answered "no" and the circuit court affirmed.

2. Under a liability insurance policy that provides coverage only if the insured was "legally obligated to pay" damages to a third party, was the "legally obligated to pay" requirement satisfied where the insured denied liability, the insured paid no money to the claimant, and the claimant released the insured?

   The district court and circuit court found it unnecessary to reach this issue, although it provided an additional ground for judgment in favor of respondent.

PARTIES TO THE PROCEEDINGS AND AFFILIATIONS

Western Heritage Insurance Company is a corporation wholly owned by Scottsdale Insurance Company, which in turn is a corporation wholly owned by Nationwide Mutual Insurance Company. Nationwide Mutual Insurance Company is not a publicly held company.

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Respondent Western Heritage Insurance Company respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below.

This action involves a claim for insurance coverage under a liability policy issued by respondent Western Heritage Insurance Company to the Jessamine County Chamber of Commerce, which is located in Kentucky. The issue simply involves the application of insurance contract language to a particular set of undisputed facts. This matter is governed by Kentucky law. It does not involve a federal question. Nor does it involve a constitutional issue. And the decision below does not conflict with the decision of any other circuit court or the highest court of any state. In short, nothing about this case meets the criteria for review by this Court, set forth in Sup. Ct. R. 10.

This action arises from a tragic accident that caused the death of a participant in a parade. The participant, 15-year-old Leslie H. Clem, Jr., fell from a trailer that was being used as a float. His high school's football team and cheerleading squad were riding on the float in a community parade sponsored by the Jessamine County Chamber of Commerce.

A wrongful-death action was commenced against the Chamber of Commerce and other defendants, including the team's coach, the owner of the trailer, and the owner/operator

of the tractor. Although the Chamber had not supplied the trailer, the tractor, or the driver, and although it did not exercise any control over the float, the plaintiffs claimed that the Chamber was negligent and therefore liable. The Chamber vigorously denied liability.

Western Heritage insured the Chamber under a general liability insurance policy. But the policy had a "participant exclusion," which precluded coverage for bodily injury to any person while "participating in any contest, demonstration, event, exhibition, race or show." Western Heritage concluded that this exclusion precluded coverage for the wrongful-death lawsuit. After Western Heritage so advised the Chamber, the plaintiffs entered a $6,000,000 settlement with the Chamber. The settlement did not require the Chamber to pay anything to plaintiffs and did not call for entry of judgment against the Chamber. In fact, the settlement included a release, thereby precluding any such judgment. It also stated that the settlement was not an admission of liability, and that the Chamber denied liability. In exchange, the Chamber simply assigned to the plaintiffs whatever claims it had against Western Heritage.

The plaintiffs then filed this lawsuit against Western Heritage, contending that its policy covered the wrongful-death claim and that it was obligated to pay the $6,000,000 settlement.[1] Western Heritage moved for summary judgment on the ground that the participant exclusion precluded coverage. It also argued that the settlement agreement did not establish the insured's legal liability as required by the

1. The suit was originally filed in state court. Western Heritage removed the suit to the United States District Court for the Eastern District of Kentucky under 28 U.S.C. §§ 1441 and 1446, based on diversity of citizenship, 28 U.S.C. § 1332.

policy; thus, there was no basis for requiring Western Heritage to pay plaintiffs $6,000,000.[2]

The district court ruled that the policy precluded coverage for Clem's injuries because he sustained those injuries while participating in an event. (Petitioners' Appendix at 37a) The court therefore ordered summary judgment for Western Heritage, and dismissed plaintiffs' claims. (Petitioners' App. 39a) The court found it unnecessary to address the argument regarding the absence of the insured's legal liability. On appeal, the Court of Appeals for the Sixth Circuit affirmed. (Petitioners' App. 3a) The circuit court likewise ruled that the Participant Exclusion applied, and it was unnecessary to address the alternative ground relating to whether the settlement agreement satisfied the policy's "legally obligated to pay" requirement. (Petitioners' App. 16a)

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2. The liability insurance policy covers only those sums the insured is legally obligated to pay because of covered damages. This "legally obligated to pay" requirement is set forth in the policy's insuring agreement. If the insured has no legal obligation to pay, the insuring agreement does not apply. Such legal liability is a prerequisite to coverage. In this case, no judgment establishing the Chamber's legal liability was ever entered and the settlement did not require the Chamber to pay any sums. Moreover, the settlement released the Chamber from all liability, and acknowledged that the Chamber denied liability. Under these circumstances, no coverage obligation existed because the insured had no legal liability. The insured was not obligated to pay anything. This provided an additional reason why the claim against Western Heritage in this action failed as a matter of law. But the lower courts found it unnecessary to address this ground, because they determined that the Participant Exclusion unambiguously applied.

II. Factual Background.

Western Heritage issued insurance policy number SCP0395479 to the Jessamine County Chamber of Commerce. (Petitioners' App. 69a) The policy provided general liability insurance coverage with a $1,000,000 per-occurrence limit. The policy's insuring agreement stated in part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. * * *

(Petitioners' App. 71a-72a) The policy also contained various exclusions and endorsements that identified certain bodily injury or property damage to which the insurance did not apply. In particular, it contained the following endorsement:

THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY.

PARTICIPANT EXCLUSION

> Such insurance as is provided by this policy does not apply to, and the Company shall have no duty to defend any action brought to recover damages because of:
>
> A. "Bodily injury" or "personal and advertising injury" to any person while practicing for or participating in any contest, demonstration, event, exhibition, race or show.

> As used in this provision any person shall include but not be limited to participants, attendants, mechanics, stewards, timing officials, announcers, corner men, musicians, singers, animal handlers, officials or any other person employed by or doing volunteer work for the named insured.
>
> B. "Property damage" to any property of persons described in A. above including but not limited to any "auto", "mobile equipment", animal or any other property of the aforementioned persons.

(Petitioners' App. 82a-83a)

The Chamber sponsored an event known as the Jessamine Jamboree during the week of October 1-7, 2001. (Petitioners' App. 47a) One attraction for this annual event was the "Parade on Main", which occurred on October 6, 2001, in Nicholasville, Kentucky. (Petitioners' App. 47a) The designated parade route for spectators began in front of a McDonald's restaurant on North Main Street and ended in front of a Kroger's grocery store on South Main Street. (Petitioners' App. 47a-48a) The Chamber published advertisements with maps directing spectators to the parade route and other attractions. (Petitioners' App. 50a)

To participate in the parade, an entry form had to be submitted to the Chamber. A local high school football team and cheerleading squad decided to participate in the parade and thus submitted its entry form. (Petitioners' App. 87a) The form included a "release of responsibility" clause, thus indicating that the Chamber was not undertaking any

particular duties with respect to the participant's own float. (*Id.*)

The coach of the football team, Wes Johnson, allegedly told the team that participation in the parade was mandatory. (APX 194)[3] Leslie H. Clem, Jr., was on the team and participated in the parade. His mother, Janet Clem, was one of two adults who also rode on the float. Another parent, Pamela Green, took the lead in obtaining the tractor-trailer unit that was used as the float. (APX 195-197) Glenn Hensley provided his tractor and was also the float's driver. C.M.C., Inc. provided a "lowboy" trailer. (APX 154-55) Both Hensley and C.M.C. operated as common carriers in interstate commerce. (APX 154)

In prior years, the high school had entered a float in this parade. On past occasions, they had used the McDonald's parking lot as the staging area. But at the October 2001 parade, they assembled in the Winn Dixie parking lot. (APX 201) After the players, cheerleaders, and adults boarded the float, it pulled out onto Main Street. The float made no turns until it reached Kimberly Drive. (APX 202-03) Janet Clem testified that in past years they disembarked at Kroger's, but this had caused the parade to back up. Thus, if they were not permitted to disembark at Kroger's, they would return to Winn Dixie. (APX 212-13)

According to the other adult participant, Sherry Utley, the ride on the float was very "jerky." She indicated that the float periodically stopped. When it started again, it jerked and caused kids to fall. According to Ms. Utley, this occurred

3. References to "APX" are to the Joint Appendix provided to the circuit court. Respondent will gladly provide the Joint Appendix to the Court if it so desires.

along the whole route. (APX 248) At the end of the designated parade route, the float turned onto Kimberly Drive. After traveling a short distance on Kimberly, perhaps 150 feet, there was another instance where the float started with a jerk, causing some participants to fall. (APX 210; APX 251-52)

Sadly, on that particular occasion, Leslie Clem's foot became entangled in the wheels and he was pulled under the trailer. When the float stopped, he was pinned beneath the wheels. Many witnesses provided statements immediately after the accident. The police report summarized them as follows:

> Operator of [the float] stated he was westbound on Kimberly Dr pulling a trailer which was being used as a float during the Jessamine Jamboree. He said he was going between 01 05 miles per hour when he felt something under this trailer. As he looked he saw the victim and stopped.
>
> Witness statements said the victim had his foot on the trailer tire and as the vehicle moved the trailer gave a sudden jerk causing the victims foot to fall between the trailer wheel well and the tire pulling the victim thru the tire and trailer wheel well. Witnesses stated tried to pull his foot and leg free but could not. Trailer was open wheel trailer.

(APX 214) The supplemental report stated:

> (1) witness states [float] was slowing and it kind of jerked and then saw victim fall between the tire and wheel well of trailer. Other witnesses

> report [float] was slow moving and victim's foot was observed on the tire and others report victim playing with the tire and his foot got caught causing him to be pulled between the tire and wheel well and that truck then stopping abruptly with the trailer coming to rest on the victim's leg.

(APX 217) Unfortunately, Leslie Clem died a few hours later.

A wrongful death lawsuit was commenced against Glenn Hensley, C.M.C., Inc., Wes Johnson, and the Chamber. (APX 153) The complaint alleged that Wes Johnson, as a teacher and head football coach, had assumed responsibility to supervise the team during the parade. It alleged that he had a duty to investigate the safety of the float. (APX 155-56) The complaint alleged that C.M.C. had duties of care in providing the trailer for use as a float. (*Id.*) It alleged that Hensley had a duty to operate his tractor in a manner reasonably prudent for the protection of persons being transported on the trailer. (*Id.*) It also alleged that the Chamber had duties to promulgate safety standards, reject non-complying floats, monitor floats during the parade for safety, and terminate those that were operated otherwise. (*Id.*)

The complaint then alleged facts relating to the accident. It alleged that as the float proceeded on Kimberly, Clem fell and was pulled underneath the exposed tires. And it alleged that as a result of the accident, he sustained injuries that were fatal. (APX 157) The complaint then alleged that defendants' negligence was a substantial factor in the injuries and death.

Western Heritage advised the Chamber that its policy did not cover this lawsuit because Clem's injuries fell within the participant exclusion. After defending for some time, the

Chamber entered a settlement agreement with the plaintiffs. (Petitioners' App. 41a) The stated settlement amount totaled $6,000,000. (Petitioners' App. 42a) But the agreement did not require that the Chamber actually pay anything. It stated that "no attempt shall be undertaken by [plaintiffs] toward collection of the settlement amount above-mentioned from the [Chamber]." (*Id.*)

The Chamber assigned to plaintiffs "any and all claims and rights of recourse which it may have against any liability carrier by which it was insured on the date of the occurrence * * *." (Petitioners' App. 42a-43a) Plaintiffs agreed that the Chamber was "fully released and discharged * * * from any obligation or liability respecting the occurrence aforementioned." (Petitioners' App. 44a) The agreement also recognized that the Chamber continued to deny liability:

> [N]othing hereunder shall be deemed or construed as an admission of liability on the part of the [Chamber], same being specifically denied.

(*Id.*) The plaintiffs further agreed to execute an "agreed order" dismissing all claims against the Chamber with prejudice. (*Id.*) It is undisputed that no judgment was taken against the Chamber. It is also undisputed that dismissal of the claims with prejudice precludes the possibility of the Chamber ever being legally obligated to pay any damages as a result of this accident.

REASONS FOR DENYING THE PETITION

I. The District Court and Circuit Court Properly Ruled That the Policy's "Participant Exclusion" Precluded Coverage.

Petitioners throw much rhetoric at the decisions below. They call them "colossal" errors. (Petition 13) They state that the decisions "could not possibly be any more incompatible with established authority." (Petition 14) And they describe the courts' finding that the applicable policy language is unambiguous as "mind-boggling." (Petition 19) But Petitioners' rhetoric itself could not be further from reality. The decisions of both the district court and circuit court are properly grounded in applicable Kentucky law. The decisions do not contradict any rule of contract interpretation, and they represent a proper application of the plain language of the insurance policy to a particular set of undisputed facts.

The policy's "Participant Exclusion" precludes coverage for bodily injury to any person while participating in an event. The Chamber sponsored an event known as the Jessamine Jamboree, which included a parade. While Leslie Clem, Jr., was riding on a float that was part of this parade, he sustained fatal injuries when he fell off the float. Under the exclusion's plain language, the policy did not cover Clem's injuries because he sustained them while participating in the event.

In reaching that conclusion, the district court and circuit court correctly followed Kentucky law. Under that law, the lower courts were required to apply the plain meaning of contract language as it was written. *Kentucky Association of Counties, All Lines Trust v. McClendon*, 157 S.W.3d 626

(Ky. 2005).[4] Although Kentucky law requires ambiguous language to be construed against the drafter, this rule of liberal construction in favor of the insured does not apply if there is no ambiguity. Moreover, Kentucky law prohibits a court from using a non-existent ambiguity to rule against an insurer. It also prohibits a court from enlarging coverage under the guise of construction. *Id.* at 630-33.[5]

The petitioners invited the lower courts to violate every one of these principles. But the courts rejected that invitation. They correctly ruled that the participant exclusion

4. The Kentucky Supreme Court in *McClendon* explained the general rules for interpreting insurance contracts under Kentucky law:

> Terms of insurance contracts * * * are to be interpreted according to the usage of the average man * * * in light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured. But this "rule of strict construction against an insurance company *certainly does not mean that every doubt must be resolved against it* and does not interfere with the rule that the policy *must receive a reasonable interpretation* consistent with * * * the plain meaning * * *."

157 S.W.3d at 630 (citations omitted) (emphasis added).

5. The Kentucky Supreme Court in *McClendon* explained:

> [W]here there is no ambiguity, the rule of liberal construction in favor of the insured is inapplicable. As it has been stated numerous times by the courts in this Commonwealth, courts cannot enlarge coverage or make new contracts under the guise of construction, but must determine the parties' responsibilities according to the contract terms.

157 S.W.2d at 633.

was unambiguous and plainly precluded coverage for Clem's injuries because they happened while he was still participating in the event. The circuit court rejected petitioners' strained efforts to create ambiguity where none existed. Consistent with Kentucky law, the circuit court properly refused to rewrite the participant exclusion so as to create coverage where none was intended under the policy's plain language.

The petitioners offered far-flung hypothetical situations that, according to them, demonstrated that the exclusion does not apply to a person who is "going to" or "coming from" an event. The problem, of course, was that the undisputed facts here are nothing like these hypothetical situations. Clem was not injured while he was traveling to or from the event. Instead, it is undisputed that, at the time of the accident, the float had just turned off of Main Street at the end of the designated route for spectators. Clem was then injured when his foot became entangled in the float's wheels while it was still in the process of traveling to the location where the participants would disembark.[6]

On *these* undisputed facts, Clem plainly sustained his injuries while participating in the event. As both of the lower courts determined, Clem's *participation* in the event had not ended merely because the accident happened at a location just past the end of the official parade route.[7] The float may

6. Petitioners' own expert stated in an affidavit that the distance from Main Street to the location of the accident was about 179 feet. (Petitioners' App. 51a-52a)

7. Petitioners confuse the ending point of the official parade route for spectators with the ending point of Clem's *participation* in the event. As the district court explained, these are two different things and Clem's *participation* in the event had not ended merely because the float passed by the end of the parade route:

have passed by the end point for the spectators, but Clem's participation in the event did not end until he and the other participants had the opportunity to disembark from the float. The accident happened only about 150 feet past the end point for the parade route, and before the participants had an opportunity to exit the float. On these facts, Clem sustained his injuries while participating in the event.[8]

(Cont'd)

> [P]laintiff's interpretation requires the Court to read additional terms into the Participant Exclusion. The exclusion does not read that it applies only if a person is injured 'while participating in *the officially-designated portion* of any contest, demonstration, event, exhibition, race or show.' The court considers the plaintiffs' interpretation too narrow, focusing on the arbitrary point at which the official parade route ends, as opposed to when *Clem's participation* in the parade ended.

(Petitioners' App. 35a) (italics original).

8. The circuit court explained its reasoning as follows:

> [Plaintiff] strenuously argues that the decedent was no longer participating in the parade because the float had left the parade's official route by the time of the accident. We do not agree. Whether a float could travel beyond some outer boundary so that its riders would no longer be participating in the parade by their lack of proximity to the parade route would require us to engage in needless speculation. It is unquestioned that the float in this case had just left the parade's viewing terminus, had traveled only about 150 feet further, and had not yet provided its riders with any opportunity to debark. Whatever the possible merits of this argument on other facts, no reasonable trier of fact could find that traveling 150 feet with no opportunity to debark constitutes exiting the parade's zone of participation.

(Petitioners' App. 15a-16a)

The lower courts correctly rejected petitioners' argument as being an unreasonable interpretation that was inconsistent with the policy's plain language and inconsistent with the undisputed facts. This was entirely consistent with the rules of contract interpretation announced by the Kentucky Supreme Court. Thus, the lower courts did not deviate from applicable state law.[9]

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9. Contrary to Petitioners' suggestion, the decision below is not somehow in conflict with the decisions of other courts that have addressed similar exclusions. Petitioners refer specifically to *Glenn Falls Group Ins. Co. v. Simpson*, 439 S.W.2d 292 (Ark. 1969), and *Town of Surfside v. Morrison Assurance Co.*, 394 So.2d 530 (Fla. Ct. App. 1981). These two cases simply represent situations where an exclusion did not apply based on the particular facts at issue.

In both cases, the policy excluded any person "participating in any physical training, sport, athletic activity, or contest." In *Simpson*, after a golf game was terminated by rain, several golfers headed off the course. One of them was standing under a tree when he was struck by lightning. The court ruled that the exclusion did not apply because the person was not participating in the sport at the time of his injury. Likewise, in *Town of Surfside*, after a softball game was over, a boy was injured outside the ballpark when attempting to retrieve a ball that was floating in some water. Apparently, the boy stood and hit his head on a bridge. The court found the exclusion inapplicable because the boy was plainly not participating in an athletic activity when he was injured. In each case, the injuries occurred after the injured person's participation in the sports had unquestionably ended.

If Clem, his teammates, and the cheerleaders had ridden the float to their final destination, Clem had exited the float, and *then* he sustained injury by something unrelated to his participation in the parade, petitioners' reliance on *Simpson* and *Town of Surfside* might be well placed. But that is not what happened here. His participation in the event directly involved riding the float, and that

(Cont'd)

Petitioners have been grossly unfair in their characterizations of the lower courts' decisions. Rather than being "colossal" errors, the lower courts' decisions properly followed applicable state law as announced by Kentucky's highest court, they properly employed logical reasoning, and they properly recited the undisputed facts upon which their decisions were based. Nothing about the decisions warrants the exercise of this Court's supervisory powers.

II. Petitioners' Due Process Contention is Without Merit.

Petitioners contend that this case presents the same due process considerations that warranted this Court's review in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). But that contention can be quickly rejected even under a cursory review of *Campbell*. This Court granted review in *Campbell* to address whether a $145 million punitive-damage award could withstand scrutiny under the Due Process Clause and the Fourteenth Amendment. The Court noted that the Due Process Clause affords protection in such cases because "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 417. Also applicable in *Campbell* was the principle that "to the extent [a punitive damage] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.*

(Cont'd)

participation had not ended when he sustained his injury. Moreover, the injury-causing instrumentality was, indeed, the parade float itself. The *Simpson* and *Town of Surfside* cases serve only to confirm that the participant exclusion applies under the undisputed facts of this case.

The due process considerations in *Campbell* have no application whatsoever here. There is nothing analogous between this case and *Campbell*. The present case does not involve punishment. Nor does it implicate a State's arbitrary deprivation of property. Moreover, unlike the question concerning review of punitive-damage awards under the Due Process clause, this case does not present any issue that is susceptible to repetition until addressed by this Court.

The only similarity between this case and *Campbell* is that the dispute in each case had its origins in an insurance contract. After that, the similarity ends. Indeed, while petitioners cite *Campbell* as support for granting review in this case, they make no real effort to articulate an actual due-process issue. Instead, petitioners' due process contention boils down to the assertion that the lower courts' decisions were wrong. The only "process" that petitioners claim to have been deprived of was "a proper application of controlling law to the facts presented." (*See* Petition 28) Such an argument utterly fails to present a violation of the Due Process Clause.

Petitioners had a full and fair opportunity to present all of their arguments, all of their authorities, and all of their evidence. They took full advantage of that opportunity in both the district court and the circuit court. There was plainly no due process violation. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

CONCLUSION

Respondent Western Heritage respectfully asks this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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